BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VERNON D. GAGE Claimant VS. **WEST & COMPANY PAINTING, LLC** Respondent AND **HARTFORD INSURANCE CO. OF THE MIDWEST** Insurance Carrier	)	Docket No. 1,058,681

ORDER

STATEMENT OF THE CASE

Claimant requested review of the June 27, 2012, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Chris A. Clements, of Wichita, Kansas, appeared for claimant. Timothy A. Emerson, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The June 27, 2012, Order denied claimant's request for preliminary benefits. The Administrative Law Judge (ALJ) did not reach the issue of whether claimant sustained personal injury by accident that arose out of and in the course of his employment because she found claimant failed to sustain his burden of proof that he provided respondent with timely and appropriate notice of accident.

The record on appeal is the same as that considered by the ALJ and consists of the transcripts of the Preliminary Hearing held January 19, 2012, and the continuation (Volume II) on February 14, 2012, and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant asks the Board to find that he gave respondent timely notice of his accidental injury. Claimant contends his boss had "actual knowledge of the medical situation and the potential injury suffered by Claimant; because notice was given as soon as it was medically confirmed that an injury had occurred . . . ."[1]

Respondent contends the ALJ correctly found that claimant failed to sustain his burden of proof that appropriate notice of accident was provided pursuant to K.S.A. 2011 Supp. 44-520.

The issue for the Board's review is: Did claimant sustain his burden of proof that he gave respondent appropriate and timely notice of accident?

FINDINGS OF FACT

Claimant worked for respondent as a carpenter and "jack of all trades."[2] On October 24, 2011, claimant, with no help, was hanging off a roof "putting a 14-foot board on."[3] Claimant said in doing so, he put pressure on his rib cage. He said his chest started hurting then. He admitted he did not tell anyone that he had bent over and hurt his shoulder or chest.

Claimant testified that on October 25 and October 26, 2011, he was again working alone, re-basing some siding on a chimney box. As claimant was standing up a 28-foot ladder on October 26, 2011, the wind almost blew the ladder over. He kept the ladder from falling on the glass patio furniture and got it set up against the wall. He continued to work the rest of the day. Claimant said he did not know he had been injured until the next morning. Respondent's attorney asked claimant:

> Q. [Respondent's attorney] Can you tell me the earliest possible moment that you knew you had sustained an injury to your right shoulder and your neck?
> A. [Claimant] For sure the next morning.
> Q. What date would that have been, sir?
> A. That would have been the 27th when I went to the hospital.[4]

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[1] Claimant's Brief at 3 (filed July 11, 2012).

[2] P.H. Trans. (Jan. 19, 2012) at 5.

[3] *Id.* at 19.

[4] *Id.* at 20-21.

Claimant testified that on the morning of October 27, 2011, he had chest pain and pressure in his back. He went to the St. Francis Hospital emergency room and later was admitted to the hospital, where he was treated for a heart attack. Claimant testified that his wife called Mr. West and told him claimant was going to the emergency room. He said she made no mention of a work-related injury.

At the hospital, an EKG was taken and claimant was given blood thinners and nitroglycerin tablets. Claimant was released from the hospital the following day, after it was determined that he had not suffered a heart attack. Claimant said the medication prescribed to him by the cardiologist was turning his skin yellow, so he returned to see him. The cardiologist told claimant to go to the Hunter Health Clinic for treatment because he did not have health insurance.

Claimant then sought treatment at the Hunter Health Clinic. His liver was checked because of his yellow skin. Because claimant was holding his chest, his lungs were x-rayed to check for cancer. This treatment occurred throughout the month of November.

Respondent is owned by Lawrence West. Claimant testified that when he was told by the doctors at Hunter Health Clinic that he was suffering from a work injury, he immediately told Mr. West.

At the preliminary hearing on January 19, 2012, claimant was asked:

> Q. [By Claimant's Attorney] Had you had conversations with Mr. West prior to the conclusion of treatment at the Hunter Health Clinic that you thought this was as a result of the work you were performing on the 25th and the 26th?
>
> A. [By Claimant] I, without a doctor telling me what is causing this in my chest, I could not claim to anybody that it was done at work or anywhere until I knew.[5]

On November 26, 2011, claimant sent Mr. West an email stating:

> . . . [T]he doctors . . . have come to the conclusion that I have re-injured my spine and ribcage due to the work that I do and do [*sic*] to the fact that I have done no side jobs in months it comes down to an on the job injury on your jobs. It now becomes a workmens comp case date of injury-10/24/11 and 10/25/11 location of injury 10/24/11 hanging over roof of villas doing a job that required 2 people when you would not authorize me to have a helper 10/25/11 ridgefield circle standing up a 28 foot ladder by myself with no help during a steady 20 mph wind . . . .[6]

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[5] *Id.* at 12.

[6] P.H. Trans. (Jan. 19, 2012), Resp. Ex. 2 at 12.

Claimant admitted that was the first time he notified respondent that his condition was work-related. He also stated that although the email to Mr. West set out dates of accident of October 24 and October 25 and made no mention of October 26, the ladder incident occurred on October 26, the day before he went to the hospital. Therefore, claimant said the email he sent to Mr. West would have been inaccurate by one day.

Lawrence West testified that he was claimant's employer and that respondent is a painting contracting firm. Mr. West said he was notified by claimant's wife on October 27, 2011, that claimant had fallen to his knees and grabbed his chest. She was afraid claimant had suffered a heart attack and said she was taking him to the hospital. He continued to receive updates from claimant's wife by text messages concerning claimant's condition while he was hospitalized. On November 2, 2011, claimant and his wife visited him at the office. No mention was made on that day about a work-related accident or injury. On November 11, 2011, claimant's wife sent Mr. West an email in which, along with other statements, she stated: "Vernon is not the only employee you have 'replaced' do [*sic*] to an injury on your job."[7] When asked about this statement, Mr. West stated:

> I didn't really give it too much thought. I read it, I remember, and I put it [the email] with the others. I did not know what she was referring to as far as replacing, that I had replaced other injured employees. I don't even have a clue what that means.[8]

After claimant was out of the hospital, Mr. West communicated with claimant and his wife several times by email. At no time during these communications was Mr. West advised that claimant had suffered a work-related injury.

Mr. West said claimant first communicated to him this was a work-related condition on November 26, 2011, by email. In that email, claimant said he had been injured on October 24 and 25. The first time he heard that claimant was claiming a date of injury of October 26, 2011, was at the preliminary hearing.

Marjie Gage, claimant's wife, testified that the November 26, 2011, email sent to Mr. West formally requested workers compensation benefits on behalf of claimant. However, Mrs. Gage testified she had communicated to Mr. West the issue of claimant sustaining a work-related injury in her email of November 11, 2011. Mrs. Gage said the email of November 26, 2011, was sent because the November 11 email only mentioned workers compensation "in a roundabout way."[9] She also thinks she had a telephone conversation

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[7] P.H. Trans. (Jan. 19, 2012), Resp. Ex. 2 at 4.

[8] P.H. Trans. (Feb. 14, 2012) at 22.

[9] *Id.* at 32.

with Mr. West on November 11 in which she told him claimant had been injured on October 24, 25 or 26.

Mrs. Gage thought that by November 11, 2011, she and claimant had been told that he did not have cancer or a heart problem. But they were waiting on more appointments at Hunter Health Clinic to find out what was going on, and it was another two weeks before they could get in for an appointment. But by November 11, she believed the problems claimant was having were the result of the work he performed on October 24, 25 and 26, 2011.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-520 states:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
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> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
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> . . . .
>
> Notice may be given orally or in writing.
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> . . . .
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> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
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> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
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> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in

paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[11]

ANALYSIS

In his Application for Hearing, claimant alleged he suffered injury by accidents at work on October 24 and 25, 2011.[12] At the preliminary hearing, claimant added an incident with a ladder that occurred while working on October 26, 2011. Claimant did not report any of these alleged accidents on the dates they occurred because he did not think he was injured. On the morning of October 27, 2011, claimant woke up feeling chest pain and pressure in his back. Not knowing what was wrong, claimant went to the emergency room at St. Francis Hospital, where he was examined for a possible heart attack. He was released the next day. Claimant was advised that his symptoms were not due to his heart, but because he did not have health insurance, claimant was told to pursue treatment elsewhere to determine the cause of his symptoms. Claimant went to Hunter Health Clinic, where additional tests were performed. Neither claimant nor the physicians were treating the problem as an injury. Instead, the focus was on diagnosing an illness or a personal medical condition such as liver disease or cancer. It was not until on or about November 26 before the physicians ruled out illness and disease and focused on physical injury as the problem. It was at that point that claimant decided his injury was work-related and he gave notice to respondent by email of the alleged work accidents on October 24 and 25, 2011. That notice was beyond the statutory 30-day maximum.

Claimant argues that notice of accident was not required within 30 days because Mr. West had actual knowledge of the injury. As such, claimant argues the notice requirement is waived, citing K.S.A. 2011 Supp. 44-520(b). This Board Member disagrees. If claimant did not know he was injured as opposed to being ill, then it is not reasonable to impute such knowledge on the supervisor, Mr. West. Claimant acknowledges that "[t]he

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[10] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[11] K.S.A. 2011 Supp. 44-555c(k).

[12] Form K-WC E-1, Application for Review, filed November 29, 2011.

purpose of 'notice' is to give the employer and/or their [*sic*] insurance carrier an opportunity to investigate the alleged injury and the circumstances surrounding it."[13] Knowing that claimant is treating for some uncertain medical condition does not alert the employer to investigate a potential work-related component to that condition. The purpose of the notice statute was not satisfied by claimant's emails appraising Mr. West of the status of the medical testing and treatment claimant was receiving. Before the email of November 26, 2011, the closest claimant came to alerting Mr. West of a possible work-related component to his injury was the email of November 11, 2011. Unfortunately, that email cannot be read to be claiming there was either an injury or that it occurred at work. It reads in pertinent part:

> The doctors have determined it is NOT his heart or his liver, we are due to have an x-ray of his spine and rib cage. Vernon is not the only employee you have "replaced" do [*sic*] to an injury on your job. As an employer, you are required to send in a form to the state [*sic*] when hiring someone with disabilities. As stated in the message on your phone (11/9/11) I am again requesting a copy of his application. You [*sic*] co-operation [*sic*] is highly requested in this matter. We will be seeking legal help to assist in medical treatment as we feel you are not conserned [*sic*] with your workers [*sic*] health.[14]

Mr. West testified he did not know what to make of this email, but he did not understand it to be a suggestion that claimant's condition was either an injury or due to a work-related accident. This Board Member agrees that the language in the email is obtuse and too vague to constitute either notice of an accident or of a possible work-related injury. Claimant acknowledged in his testimony that he did not know that his condition was due to an injury or suspect a work-related accident was the cause until on or about November 26, 2011. Therefore, claimant could not have been referring to an injury during his employment with respondent in the November 11, 2011, email. It could be interpreted as referring to injuries he had suffered when working for a prior employer or in the automobile accident that likewise occurred before his employment with respondent. In any case, it would have required speculation and assumptions in order to construe the email as a notice of a work-related accident.

CONCLUSION

Claimant has failed to sustain his burden of proving that he gave either notice of accident within 30 days or that the employer had actual knowledge of the injury.

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[13] Claimant's Brief at 2 (filed July 11, 2012).

[14] P.H. Trans., (Jan. 19, 2012), Resp. Ex. 2 at 4.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 27, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2012.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
cac@cl.kscoxmail.com
rdl@cl.kscoxmail.com

Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
timothy.emerson@thehartford.com
denise.allen@thehartford.com

Nelsonna Potts Barnes, Administrative Law Judge